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OCTOBER TERM, 1944

JOHN BARR, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN REPLY TO
BRIEF OF THE FEDERAL RESERVE BANK OF NEW
YORK AS AMICUS CURIAE

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The brief filed by the Federal Reserve Bank of New York as *amicus curiae* herein assumes a basic position which the Government need not challenge in reply, since Point III of the argument in our principal brief deals with the situation that would follow from the Bank's argument that it was authorized to certify more than one rate of exchange with respect to the British pound on May 3, 1940. Its argument that the rates which it certified are "final and conclusive" is not stressed as against the action of the Secretary of the Treasury in selecting the "official" rate. (Brief of *Amicus Curiae*, p. 42.)

We have not contended that the Bank proceeded improperly in certifying more than one buying rate for the British pound on May 3, 1940, but have argued merely that the statute contemplated only a single rate and that, under the circumstances of this case, that rate was the "official" rate upon the British pound or was made so by the Secretary's action. The Bank's certification of two rates instead of one left the Secretary of the Treasury, as we contend, under the necessity of determining which rate should be used for customs purposes; and his determination is controlling, either because it is right under the statute or because it is final in the absence of palpable inconsistency with law. It is difficult to discern an adequate reason for the Bank's concern, as expressed in its brief, with the use which is made of the rates certified by it.

In the brief of the Bank there are, in our opinion, several errors which recur in the argument and which, although the answers to them are already contained in our principal brief, should receive brief treatment in the light of the Bank's discussion.

I

Running through topics A and B of Point I of the Bank's brief is a persistent confusion of the market value of imported goods with their cost to the importer. Mention is made (pp. 20-21) of authorities which allegedly rec-

ognize that the rate for foreign exchange "with which imported merchandise is purchased is the sound measure of value of the foreign currency to be used in the computation of dutiable values in dollars * * *, and that the use of such rates produces values * * * which are, or most nearly approximate, the actual dollar values of the imported merchandise." *United States v. Whitridge*, 197 U. S. 135, is quoted (p. 21) as referring to "actual cost or market value" of goods as though these were the same for *ad valorem* duty purposes. These expressions, however, must be understood in the light of conditions at the time they were uttered, when as we have pointed out (Govt. brief, pp. 22-23, 24), the value of a foreign currency was the same as the rate at which exchange could be purchased and the payment made for goods was, therefore, the same as their value in the same currency.

Our brief (pp. 27-28) has already emphasized the distinction between the cost, or price, of imported goods and their value. Section 402 of the Tariff Act clearly requires that customs duties be assessed upon their value (ordinarily their value abroad) and not upon their cost. The rate of exchange upon the currency with which they were purchased does not properly enter into a computation of their value in dollars unless it states the relationship between the value of the currency in which the goods must be valued and United States dollars. Unless the rate

of exchange between the foreign currency and American dollars, which is used for customs purposes, is the same as the rate prevailing at the place of exportation, either generally or with respect to the proceeds of the exported goods, it introduces inaccuracy into the calculation. Therefore the Bank's insistence that the rate of exchange used in paying for goods should also be used in valuing them for customs purposes breaks down.

The problem and its correct solution are highlighted by the situation disclosed in the footnote on page 35 of the Bank's brief. In that situation, involving the currency of Brazil, the American importer is unable to purchase Brazilian goods by acquiring Brazilian foreign exchange in New York. He must remit in dollars which the Brazilian exporter may then convert into cruzeiros, partly at a Brazilian "official" rate and partly in the open market. There is, therefore, no buying rate for Brazilian currency in New York which has any relation to payment for the goods. Nevertheless, goods imported from Brazil must initially be valued in cruzeiros for customs purposes and, if a value in dollars is to be obtained, a rate of conversion must be used despite the fact that the importer does not buy cruzeiros at all. In other words, the method of payment for goods has basically nothing to do with valuing them for customs purposes or assessing the duty upon them.

The brief of the Federal Reserve Bank (p. 25) attempts to bolster the argument that the value of imported goods should be converted into dollars at the rate of exchange employed in paying for the goods, by referring to the "obvious analogy" which is said to exist "where the different currencies of several countries have a common designation," such as pounds. The analogy is false and misleading. The name of a currency has nothing whatever to do with its value or its identity. The fact that several currencies have the same name does not render them the same, and they necessarily have independent values. The value of imported goods must be ascertained with reference to a currency which is used in the country from which the goods were exported. It is the conversion of that currency into United States dollars which presents the present problem. It may at times be true, as a footnote (n. 20) on the same page of the Bank's brief points out, that two or more currencies of different character may circulate in a single foreign country. When this is true, as is plainly pointed out in passages from the Customs Regulations which the footnote quotes (Art. 776 (f), (i), Customs Regulations of 1937 as amended by T. D. 50251, 76 Treas. Dec. 111, 115-116), the goods are valued with reference to "the currency in which such or similar merchandise is usually bought and sold in the ordinary course of trade" (Art. 776 (i))—not in the currency which may have been paid for them by the

particular importer. The Bank's argument consequently answers itself.

II

The statement is made (Brief of *Amicus Curiae*, p. 36) that "Section 522 (c) deals essentially with orders in the form of cable transfers pertaining to foreign currency credits. It is the different attributes and prices of such orders and credits that are material * * *, not the attributes and prices of actual foreign paper currency and coins." We submit that Section 522 (c) deals "essentially" with the value of foreign currency (which of course means credits as well as paper currency and coins); and the price of cable transfers is significant only in so far as it throws light upon that value. The assertion (pp. 38-39) that the collector of customs should in all cases use the rate of exchange paid by the importer in order to make payment for the goods to be valued, ignores the central problem and overlooks the lack of correspondence which may arise between a given rate of exchange and the value of a foreign currency upon which there are several such rates. A rate for cable transfers, which registers supply and demand in the particular market as affected by legal restrictions, domestic and foreign, is no more and no less significant as respects a given currency than a rate for paper money and coins would be.

III

The statement is made (Brief of *Amicus Curiae*, p. 39) that "application of the opinion of the Court of Customs and Patent Appeals would require the use in all cases of a dollar value of foreign currency fixed by the foreign country of export at any figure, however arbitrary." This is not true. The Court of Customs and Patent Appeals does not state, and no contention has been made in this case, that a foreign "official" rate must always be used, whenever there is such a rate. The British official rate upon the pound, for reasons stated in our principal brief, was, we believe, the rate which conformed to the requirements of Section 522 (c) of the Tariff Act on May 3, 1940; but it does not follow that a rate upon a foreign currency which happened to be denominated "official" would always conform to the statute. The question always is whether there is a buying rate on the New York market which can be said to be "the buying rate" and to represent the value of the foreign currency. Whether such a rate is "official" or "free" or something else, it is the rate which should be used. If, as here, several rates exist which the Bank deems worthy of certification, the Secretary of the Treasury must determine which, if any, to publish and use.

IV

The Bank's brief asserts (p. 22, n. 18) that Congress "did not intend that any foreign manipulation [of currency] should be compen-

sated for by reciprocal manipulation by the Federal Reserve Bank of New York of a rate of foreign exchange certified under section 522 (c)." With this conclusion we fully agree. The Bank is made a fact-finding agency by Section 522 (c). Manipulation of any kind is not one of its functions. Any considerations of international commercial policy which, under the statute, may properly enter into a determination of the rate of exchange to be used for customs duty purposes are for the Secretary of the Treasury and not the Bank to take into account. The Bank can only perform its fact-finding function of reporting "the buying rate" as its expert judgment dictates. The Secretary must deal with the situation so revealed, as required by law and by his exercise of the responsible discretion conferred upon him.

Respectfully submitted,

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